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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

BEVERLY HILLS UNIFIED SCHOOL DISTRICT, Plaintiff and Appellant, v. GULF UNDERWRITERS INSURANCE COMPANY, Defendant and Respondent.	B188322 (Los Angeles County Super. Ct. No. BC314315)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard L. Fruin, Judge. Affirmed.

Orbach, Huff & Suarez and Mark L. Jubelt for Plaintiff and Appellant.

Morrison & Foerster, David B. Babbe and Sonia S. Waisman for Defendant and Respondent.

INTRODUCTION

This cases involves an insurance coverage dispute. The Beverly Hills Unified School District (BHUSD) permitted oil and gas exploration and drilling on its high school campus. Multiple personal injury lawsuits have been filed against BHUSD for injuries and deaths allegedly caused by the contamination created by these activities. BHUSD tendered its defense to Gulf Underwriters Insurance Company (Gulf). Gulf denied coverage based upon a pollution exclusion in its policy. BHUSD filed a declaratory relief action. The trial court granted summary judgment to Gulf. BHUSD appeals, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Tender and Rejection of a Defense*

There are now eight consolidated actions pending against BHUSD. When BHUSD first sought a defense from Gulf, the operative third party pleading was the first amended complaint filed in the Moss action. The plaintiffs (or their deceased spouses) in the Moss action had been students at Beverly Hills High School at some point during the period 1977-1996. The complaint alleged that during "the oil and gas exploration, completion, production, storage and processing" at the on-campus site, "toxic chemicals have been and continue to be generated, spilled, emitted, released, discharged, stored, processed and vented onto the Campus." Plaintiffs listed more than 150 substances they characterized as the "toxic chemicals" which had been released. Plaintiffs alleged that these chemicals "contaminate[d] the Campus and surrounding communities' air, soil, water and environment" and were "either independently or in combination, . . . a substantial factor in causing or promoting cancer" and other illnesses in plaintiffs. All plaintiffs (or their deceased spouses) have been diagnosed with Hodgkin's disease.

The Moss complaint alleged multiple causes of action. The negligence cause of action alleged that BHUSD had been negligent for "Failing to prevent the discharge or release of toxic chemicals and waste onto and around the Campus; . . . Failing to adequately monitor and to study the levels of toxic chemicals released . . . onto and around the Campus; . . . Failing to warn or adequately warn . . . of the toxic nature of the chemicals used, generated, emitted, released, vented, stored, processed and disposed at [from the site] operating on, and in close proximity to the Campus and released onto and around the Campus; . . . Failing to warn or adequately warn . . . of migration of these toxic chemicals from the [sites] onto and around the Campus; [and] Failing to provide [the plaintiffs] with accurate, reliable and completely truthful information regarding the amounts of releases, discharges, fugitive emissions, leaks and spills and the types of chemicals and substances released, produced, vented, discharged, emitted, leaked and/or spilled from the [sites] and onto the Campus."

Gulf denied coverage in July 2003. The exclusion at issue in this case is entitled "Seepage, Pollution and Contamination." (Capitalization omitted.) It provides that "[n]otwithstanding anything to the contrary contained in this policy, it is hereby understood and agreed that this policy is subject to the following exclusions and that this policy shall not apply to: [¶] . . . [¶] (7) . . . Liability for any bodily and/or personal injury to or illness or death of any person or loss of, damage to, or loss of use of property directly or indirectly caused by or arising out of seepage into or onto and/or pollution and/or contamination of air, land, water, and/or any other property and/or person irrespective of the cause of the seepage and/or pollution and/or contamination, and whenever occurring." The policy does not define pollution or contamination.

2. *BHUSD's Declaratory Relief Action*

In April 2004, BHUSD filed its declaratory relief action against Gulf.[1] At that point, four separate actions, involving more than 400 plaintiffs, were pending against BHUSD. BHUSD's declaratory relief action conceded that the four actions were essentially factually and legally identical.[2] BHUSD quoted at length from the third amended complaint filed in the Moss action to explain the nature of the third party claims. BHUSD urged that the pollution exclusion in Gulf's policy did not apply since that exclusion applied only "in certain, often limited, circumstances." BHUSD suggested that the exclusion did not apply because the third parties' lawsuits did not involve "classic environmental 'pollutants'," but, instead, "ordinary acts of negligence or . . . localized exposure to toxic chemicals."

3. *Gulf's Summary Judgment Motion on Declaratory Relief Action*

In September 2005, Gulf moved for summary judgment. It contended that the pollution exclusion negated any potential for coverage and, therefore, any duty to defend against the four lawsuits. To explain the nature of the third party actions, Gulf's motion quoted from BHUSD's declaratory relief complaint and asked the trial court to take judicial of that pleading. In addition, Gulf's Separate Statement of Undisputed Facts relied heavily upon the BHUSD complaint. As explained above, BHUSD's complaint quoted liberally from the third amended Moss

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1 BHUSD sued more than a dozen insurers. Only Gulf is a party to this appeal.

2 BHUSD's declaratory relief action alleged that the four lawsuits, "while brought by separate plaintiffs and in some cases different law firms, follow the same format, allege the same causes of action, and further appear to be based on the same factual allegations." In a later portion of its complaint, BHUSD stated that the factual allegations in the third amended Moss complaint were "substantially similar" or "substantially the same" as those found in the other three lawsuits.

complaint and conceded that the other three lawsuits were essentially identical to the Moss action.

4. *BHUSD's Opposition to Summary Judgment*

BHUSD's opposition to Gulf's summary judgment motion urged that there was a triable issue of material fact whether the pollution exclusion applied. BHUSD advanced several arguments.

BHUSD first claimed that it was improper for Gulf to rely upon the language in BHUSD's declaratory relief complaint to establish the nature of the third party lawsuits. For instance, BHUSD argued: "Instead of referring to the Underlying Complaint [filed by the third parties], Gulf has limited its facts to select quotes from the BHUSD Complaint herein. The BHUSD Complaint was filed on or about April 23, 2004. However, since Gulf denied the tender of the claims in July of 2003, the only evidence Gulf can submit to support its motion is evidence it had in its possession at the time it denied the tender of the claim. Any evidence Gulf obtained after that time is not admissible for the purpose of an attempt to justify its denial."[3] BHUSD therefore asked the trial court to take judicial notice of all the amended complaints filed in the Moss action as well as the order consolidating the third party actions. In addition, BHUSD attached an excerpt from the third amended complaint filed in the Moss action.

In so far as is relevant to BHUSD's opposition to summary judgment, paragraph nineteen of the third amended Moss complaint alleged that during "the oil and gas exploration, completion, production, storage and processing[,] . . . toxic

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[3] BHUSD's Separate Statement of Disputed Facts disputed that Gulf could rely upon the language in BHUSD's declaratory relief complaint to support its summary judgment motion.

chemicals have been and continued to be generated, spilled, emitted, released, discharged, stored, processed and vented onto the Campus and the surrounding communities by and through the existence of production water, drilling mud, . . . natural gas and its component parts, and other waste associated with oil production." The pleading, after listing more than 150 "toxic chemicals" including copper, nickel and zinc, alleged that these chemicals "have in the past, and continue presently to contaminate the Campus and surrounding communities' air, soil, water and environment" and that the chemicals, "either independently or in combination" were a substantial factor in causing plaintiffs' injuries.

Relying on the above allegations, BHUSD urged that there was a question of fact whether the chemicals and emissions that the third parties claimed were the source of their injuries were pollutants or contaminants. That is, BHUSD contended that for Gulf to establish as a matter of law that it had no duty to defend, Gulf was required to establish that all the chemicals named in the third party complaints were pollutants or contaminants. To demonstrate that Gulf had not met that burden, BHUSD offered evidence in the form of packaging from a vitamin box to show that copper, nickel and zinc – three of the substances identified by the third parties in their complaints as causes of their injuries -- were present in multiple vitamins and thus could "not commonly [be] thought of as pollution." BHUSD also noted that Gulf had not presented any evidence that other substances identified in the third party complaints such as production water, drilling mud, and

natural gas were any different from the tap water, mud and natural gas found in the area so that they could properly be characterized as contaminants or pollutants.[4]

5. *Gulf's Reply to BHUSD's Opposition*

Gulf urged that it had properly relied upon BHUSD's declaratory relief action to frame the issues raised by its summary judgment motion. In any event, Gulf asked the trial court to take judicial notice of the first amended complaint in the Moss action, the operative pleading when Gulf denied coverage.

6. *The Hearing on the Motion and the Trial Court's Rulings*

At the hearing on the summary judgment motion, counsel for BHUSD objected to Gulf's request that the court take judicial notice of the first amended Moss complaint. The trial court overruled the objection and granted all the requests to take judicial notice that the parties had filed. On the merits, the trial court ruled: "Gulf has no duty under its policy to defend or indemnify [BHUSD]

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[4] BHUSD's opposition also urged that there was a triable issue whether another policy provision applied. The pollution exclusion upon which Gulf relied was found in an endorsement to the policy. BHUSD relied, instead, upon a provision found in the body of the policy. That provision lists 17 exclusions to coverage for liability for bodily injury or property damage. The exclusion found in paragraph f recited that the insurance did not apply "to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water, but *this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental*." (Italics added.) Hence, BHUSD claimed there was a triable issue of fact whether the "sudden and accidental" discharge exception to the pollution exclusion applied to the third party actions.

The trial court rejected BHUSD's argument. BHUSD has not pursued that point on appeal, a wise decision since it is well settled that "if there is a conflict in meaning between an endorsement and the body of the policy, the endorsement controls." (*Continental Cas. Co. v. Phoenix Constr. Co.* (1956) 46 Cal.2d 423, 431.)

in connection with any of the underlying lawsuits for which [BHUSD] seeks coverage in this litigation, based on the pollution exclusion contained in the Gulf policy, which precludes coverage for pollution claims such as the underlying lawsuits at issue."

DISCUSSION

A. The Trial Court's Consideration of Evidence

BHUSD first contends that the trial court erred by considering two documents in ruling upon Gulf's summary judgment motion: the first amended complaint filed in the Moss action and BHUSD's complaint for declaratory relief. We disagree.

In regard to the first amended Moss complaint, Gulf did not offer that pleading in support of its summary judgment motion or reference it in its separate statement of undisputed material facts. Instead, to frame the issues in the summary judgment proceeding, Gulf had utilized BHUSD's declaratory relief complaint which, in turn, had quoted liberally from the *third* amended Moss complaint. BHUSD's opposition objected to that approach although BHUSD then proceeded to quote from that very same complaint and attach a portion of it to its opposition. Consequently, when Gulf filed its reply to BHUSD's opposition, Gulf asked the trial court to take judicial notice of the first amended Moss complaint. The trial court granted the request.

BHUSD now contends that the trial court "violated [its] due process rights" by considering the first amended Moss Complaint when it ruled upon Gulf's summary judgment motion. "Whether to consider evidence not referenced in the moving party's separate statement rests with the sound discretion of the trial court, and we review the decision to consider or not consider this evidence for an abuse of that discretion." (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102

Cal.App.4th 308, 316.) Here, we find no abuse of discretion. The issue in this declaratory relief action was whether Gulf had a duty to defend BHUSD. To make that determination, the trial court was required to compare the allegations of the third party complaint pending against BHUSD at the time Gulf denied coverage in July 2003 with the language of Gulf's insurance policy. (*Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081.) In July 2003, the operative pleading was the first amended Moss complaint. It is therefore patent that the trial court did not act unreasonably in granting Gulf's request that it consider that complaint, a pleading that had been in BHUSD's possession for several years.[5]

BHUSD next urges that the trial court erred in considering the declaratory relief complaint it had filed against Gulf because that pleading was not in existence when Gulf denied coverage. But Gulf did not, as BHUSD now claims, "rely on the BHUSD complaint to support its denial" of coverage. Instead, Gulf properly utilized that pleading (including its quotations from the third amended Moss complaint) to define the issues for the summary judgment litigation.[6] (*Riverside County Community Facilities Dist. v. Brainbridge 17* (1999) 77 Cal.App.4th 644, 653 [the trial court's first step in ruling upon a summary judgment motion is to identify the issues framed by the pleadings].) Further, BHUSD's allegations in its

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[5] BHUSD has never explained how it could have been prejudiced by the trial court's consideration of the *first* amended Moss complaint. Instead, BHUSD's reply brief suggests that it was prejudiced by the trial court's consideration of the selective excerpts of the *third* amended complaint that BHUSD chose to quote in its declaratory relief action.

[6] As already noted, BHUSD's complaint for declaratory relief quoted from the *third* amended Moss complaint when, in fact, the operative pleading at the time of Gulf's denial of coverage was the *first* amended complaint. However, BHUSD has never, either in the trial court or on this appeal, claimed that there is any substantial difference between the two pleadings in so far as the coverage issue is concerned.

complaint that the claims in the other third party lawsuits were essentially identical to those made in the Moss complaint constitute judicial admissions that BHUSD was precluded from recanting in the summary judgment litigation. (See *St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.* (2003) 111 Cal.App.4th 1234, 1248.) And if there is any question whether BHUSD should be estopped from complaining about this issue, we need look no further than BHUSD's opposition to summary judgment which itself relied heavily upon portions of the third amended Moss complaint, the very pleading BHUSD quoted in its complaint.

B. The Trial Court Properly Granted Summary Judgment

The governing principles are well-settled. An insurer "must defend a suit which *potentially* seeks damages within the coverage of the policy." (*Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 275, italics in original.) "The determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the [third party] complaint with the terms of the policy. Facts extrinsic to the complaint also give rise to a duty to defend when they reveal a possibility that the claim may be covered by the policy." (*Horace Mann Ins. Co. v. Barbara B., supra,* 4 Cal.4th at p. 1081.) In a declaratory relief action brought on the issue of the duty to defend, an "insurer may move for summary [judgment] that no potential for liability exists and thus no duty to defend where the evidence establishes as a matter of law there is no coverage. [Citation.]" (*Legarra v. Federated Mutual Ins. Co.* (1995) 35 Cal.App.4th 1472, 1479.) Different showings are required of the insured and insurer. "To prevail, the insured must prove the existence of a *potential for coverage*, while the insurer must establish *the absence of any such potential*. In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*." (*Montrose Chemical Corp. v. Superior Court* (1993) 6

Cal.4th 287, 300, italics in original.) The specific principle applicable to this case is that an "insurer may refuse to defend where *undisputed facts* conclusively show liability would be excluded under the policy. [Citations.]" (Croskey, et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2006) ¶ 7:543, p. 7B-14.) We conduct a de novo review of the trial court's grant of summary judgment, including its interpretation of the pollution exclusion. (*Travelers Casualty & Surety Co. Transcontinental Ins. Co.* (2004) 122 Cal.App.4th 949, 955, and cases cited therein.)[7]

Here, the policy clearly excludes coverage for bodily injury (including illness or death) caused directly or indirectly by pollution or contamination of air, land, water, or any other property, irrespective of the cause of the pollution or contamination. Applying this exclusion to the language of the third party complaint, we conclude that Gulf has no duty defend. The Moss complaint alleged that plaintiffs were injured because, during oil and gas exploration on the high school campus, toxic chemicals were "generated, spilled, emitted, released, discharged, stored, processed and vented" that contaminated the area, including its air, soil, water and environment. The complaint further alleged that these toxic chemicals were a substantial factor in causing plaintiffs' injuries. It is therefore apparent that BHUSD seeks defense for a claim excluded by the policy: injuries

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[7] Because we conduct a de novo review of the trial court's ruling, there is no need for us to address BHUSD's arguments based upon its parsing of the trial court's tentative written ruling and its oral comments made at the hearing on the summary judgment motion. In any event, "[n]o rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusions.' [Citation.]" (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.)

caused (directly or indirectly) by seepage, pollution, or contamination of air, land, water or other property.

To avoid the force of this conclusion, BHUSD points to our Supreme Court's recent decision in *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635 (*MacKinnon*). *MacKinnon* does not support BHUSD. In *MacKinnon*, an apartment owner purchased a comprehensive general liability policy. The owner was sued for personal injuries allegedly caused by spraying a pesticide at the building to eradicate yellow jackets. (*Id*. at p. 640.) The insurer denied coverage, relying upon the policy's pollution exclusion which negated coverage for bodily injury "'[r]esulting from the actual, alleged, or threatened discharge, dispersal, release or escape of pollutants . . . at or from the insured location.'" (*Id*. at p. 639.) The policy defined pollution or pollutants as "'any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste materials.'" (*Ibid.*)

MacKinnon held that that defining the term "pollution" was the key to determining the plain meaning of the exclusion. (*Id*. at p. 652.) It concluded that a reasonable policyholder would conclude that the term was limited "'to irritants and contaminants *commonly thought of as pollution* and not as applying to every possible irritant or contaminant imaginable.' [Citations.]" (*Id*. at pp. 652-653, italics in original.) The exclusion therefore only applied "to injuries arising from events commonly thought of as pollution, i.e., environmental pollution" (*id*. at p. 653) because "the words 'pollutant' and 'pollution' have definite connotations." (*Id*. at p. 655.) The court also noted that its interpretation was "in accord with the historical purpose of the pollution exclusion and the purpose" of a comprehensive general liability insurance policy. (*Id*. at p. 655.) The court concluded that the "normal application of pesticides around an apartment building in order to kill

yellow jackets would not comport with the common understanding of the word 'pollute.'" (*Id*. at p. 654.)

BHUSD contends that *MacKinnon* requires reversal of the summary judgment because zinc, copper and nickel – three of the more than 150 toxic chemicals named in the third party complaint – are not commonly thought of as pollutants. This argument misses the mark. The policy exclusion examined in *MacKinnon* first excluded coverage for injuries caused by pollutants and then proceeded to define "pollutant." *MacKinnon* therefore held that to determine whether the pollution exclusion applied, it was required to analyze whether the pesticide used was a pollutant within the meaning of the policy. That is why *MacKinnon* characterized "the primary issue" in that case as "whether injuries outside the realm of . . . traditional forms of pollution are barred from coverage by the pollution exclusion." (*Id*. at p. 641, fn. 1.)

Here, the policy exclusion is much broader than that found in *MacKinnon*. It excludes coverage for injuries caused by seepage, pollution, or contamination, "irrespective of the cause" of the pollution or contamination. In other words, exclusion from coverage is *not* dependent on involvement of a designated pollutant or contaminant. We therefore reject BHUSD's argument that "[i]n order to meet its burden of proof [to establish no coverage and hence no duty to defend], Gulf must establish that each and every substance [identified in the third party complaint] is a pollutant." Further, the exclusion defines neither pollution nor contamination. As *MacKinnon* instructs, we must read the exclusion as commonly understood: environmental pollution.[8] And environmental pollution is at the core

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[8] In a footnote, *MacKinnon* noted that two published opinions from the courts of appeal which had addressed a similar pollution exclusion had involved "traditional environmental industrial pollution, which neither side disputes is within the scope of coverage." (*Id*. at p. 641, fn. 1.) One case, *Legarra v. Federated Mutual Ins. Co., supra,*

of the third party complaints: oil and gas exploration at an urban high school which resulted in the release of toxic substances into the air, ground and water, thereby contaminating the environment and causing illness and death. Hence, there is no coverage and no duty to defend. (See also *Garamendi v. Golden Eagle Ins. Co.* (2005) 127 Cal.App.4th 480, 486 ["The widespread dissemination of silica dust as an incidental by-product of industrial sandblasting operations most assuredly is what is 'commonly thought of as pollution' and 'environmental pollution.'"].)

BHUSD next urges summary judgment was improper because Gulf did not negate the potential of coverage for all "of the allegations of the Moss complaint and any of the allegations of the other seven Underlying Complaints."[9] This argument must fail given how the matter was litigated. This lawsuit commenced with BHUSD filing a complaint for declaratory relief against Gulf. To establish the nature of the third party claims, the declaratory relief complaint quoted extensively from the third amended Moss complaint and alleged that the other third party actions filed against it were essentially identical. (See fn. 2, *ante*.)

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35 Cal.App.4th 1472, involved groundwater contamination from a petroleum plant. The other case, *Titan Corp. v. Aetna Casualty & Surety Co.* (1994) 22 Cal.App.4th 457, involved groundwater contamination from a manufacturing plant. The *MacKinnon* footnote also cited several federal cases that had applied California law.

9 BHUSD has framed this contention in different ways. Its opening brief urges the trial court erred in failing to consider allegations that the "generation, emission, release, discharge, handling, venting, collecting, processing, storing, and/or disposing of [chemicals] on and around the Campus and surrounding communities . . . created a dangerous condition on the Campus." At another point, BHUSD's brief argues that Gulf's "failure to submit any evidence of the allegations of over 930 plaintiffs and establish how these plaintiffs' allegations are all barred by the pollution exclusion" is grounds for reversal. Regardless of how framed, the contention fails for the reasons explained above.

Thereafter, Gulf properly used that declaratory relief complaint to frame the issues in its summary judgment motion. Although BHUSD's opposition objected to that use of the declaratory relief complaint – an objection which we have already explained was meritless – BHUSD did not ask the trial court to take judicial notice of the other third party complaints,[10] did not attach a copy of the entire third amended Moss complaint, and (most importantly) did not assert that Gulf's quotes from BHUSD's declaratory relief complaint failed to accurately reflect the third party claims made against it (BHUSD). Instead, BHUSD's opposition essentially conceded the propriety of Gulf's approach. For instance, BHUSD quoted from paragraph 19 of the third amended Moss complaint and stated that all of the third party lawsuits contained those "*identical allegations* re exposure to substance that allegedly led to the injuries sustained by the Plaintiffs in the underlying litigation."[11] (Italics added.)

Based upon the above chronology, we find there are two independent reasons to reject BHUSD's argument that the trial court erred in failing to consider all the allegations found in the third party complaints.

The first reason (already mentioned above) is the doctrine of judicial admissions. BHUSD's declaratory relief complaint characterized the third party claims and BHUSD is bound by those allegations. BHUSD cannot now suggest that there was more to the third party claims than it had alleged in its own

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10 Although BHUSD asked the trial court to take judicial notice of all of the amended complaints filed in the Moss action, BHUSD never explained to the trial court how review of any portion of those pleadings established a triable issue of material fact.

11 BHUSD's Separate Statement of Material Facts included paragraph 19 of the third amended Moss complaint with the introductory phrase: "The plaintiffs in the Underlying Lawsuits allege that the following substances caused or contributed to their injuries."

declaratory relief action. "A defendant [here, Gulf] moving for summary judgment may rely on the allegations contained in the plaintiff's [here, BHUSD] complaint, which constitute judicial admissions. As such they are conclusive concessions of the truth of a matter [here, the nature of the third party claims] and have the effect of removing it from the issues." (*Uram v. Abex Corp.* (1990) 217 Cal.App.3d 1425, 1433.)

The second reason is found in the principles governing summary judgment. "[T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id*. at p. 851.) Here, Gulf met its burden of production by showing that the third party claims – as explained by BHUSD's complaint for declaratory relief—fell within the policy's pollution exclusion. The burden therefore shifted to BHUSD to produce evidence to show a triable issue of material fact on the application of the exclusion to the third party claims. BHUSD failed to do so, and, instead, permitted the court to rule based upon the evidence submitted by Gulf.[12] BHUSD therefore cannot complain

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12 As noted earlier, the only evidence BHUSD produced was a vitamin package. As already explained, that evidence did not create a triable issue of material fact because it mistakenly assumed that Gulf was required to establish that each chemical identified in the Moss complaint was toxic.

At one point, BHUSD's opposition briefly argued: "Gulf cannot limit its analysis to a few select quotes from the [declaratory relief] Complaint herein; it must resolve <u>all</u> potential questions of fact contained in the Underlying Lawsuits. Having failed to even put the Complaints in the Underlying Lawsuits into evidence in support of its motion, Gulf has failed in its Burden of Proof." (Emphasis in original.) This cursory argument

now that the trial court did not consider other allegations in the third party complaints to determine if the pollution exclusion applied.

BHUSD next advances an argument it did not raise in the trial court: the pollution exclusion is ambiguous. BHUSD urges: "The problem seems to be in how this exclusion varies from the standard pollution exclusion. The standard pollution exclusion describes the act (the release, discharge, etc.) and the substance that is released, discharged, etc. The Gulf exclusion only excludes the act . . . the process or action of seeping, polluting or contaminating." BHUSD also notes: "The second area of confusion regarding the Gulf pollution exclusion is the lack of description of what type of substance might be considered a pollutant or contaminant."

As a general rule, an appellate court reviews only issues raised in the trial court. However, if the issue involves a question of law and is based upon undisputed facts, a reviewing court has discretion to consider it. (*Johanson Transportation Service v. Rich Pik'd Rite, Inc.* (1985) 164 Cal.App.3d 583, 588; *Yeap v. Leake* (1997) 60 Cal.App.4th 591, 599, fn. 6.) We therefore simply note that the argument has no merit because BHUSD has misframed the issue.

The exclusion is not ambiguous. BHUSD's real complaint is that the exclusion is far broader than the standard pollution exclusion. However, "[a]n insurer may select the risks it will insure and those it will not, and a clear exclusion will be respected. [Citation.]" (*Legarra v. Federated Mutual Ins. Co., supra,* 35 Cal.App.4th at p. 1480.) Gulf's policy clearly excludes liability for personal

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was insufficient to establish a triable issue of material fact about application of the pollution exclusion. At this juncture, it was BHUSD's burden to produce evidence (not just argument) to support its opposition to summary judgment and to explain how that evidence demonstrated a triable issue of fact. BHUSD failed to do so and, instead, made only a cursory argument unsupported by any evidentiary references. (See also fn. 10, *ante*.)

injuries directly or indirectly caused by pollution or contamination of air, land, water, or any other property, irrespective of the cause of the pollution or contamination. This exclusion clearly and unambiguously excluded coverage for the third party claims found in the Moss complaint. No more need be said.

Lastly, BHUSD's opening brief urged that the grant of summary judgment to Gulf was reversible error because seven months later, the trial court *denied* two other insurers' summary judgment motions. Those motions also claimed no duty to defend based upon application of a pollution exception. Concurrent with filing its opening brief, BHUSD sought to augment the record to include the trial court's ruling on those motions although BHUSD conceded that those motions involved different policy language. This court denied the motion to augment because the ruling was "outside of the court's record on appeal." Later, we granted Gulf's motion to strike the portion of BHUSD's brief that relied upon the trial court's ruling denying the two other insurers' summary judgment motions. BHUSD has offered no reason for us to reconsider our two rulings. We therefore disregard in its entirety BHUSD's contention that the summary judgment granted in favor of Gulf is inconsistent with the trial court's subsequent rulings.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.